

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

KAREN ESHELMAN,

Plaintiff,

vs.

CAPITAL ONE BANK (USA), N.A.,

Defendant

Case No.: 1:19-CV-0052 (TJM/CFH)

**COMPLAINT AND JURY
DEMAND**

COMPLAINT

Plaintiff, KAREN ESHELMAN (“Plaintiff”), by and through her undersigned counsel, hereby sues Defendant, CAPITAL ONE BANK (USA), N.A. (“Defendant”), alleging as follows:

I. INTRODUCTION

1. Plaintiff brings this action on behalf of herself individually seeking damages and any other available legal or equitable remedies resulting from the illegal actions of Defendant, in negligently, knowingly, and/or willfully contacting Plaintiff on Plaintiff’s cellular telephone in violation of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227 *et seq.*

2. The TCPA was legislated to prevent companies like CAPITAL ONE BANK (USA), N.A. from invading Americans’ privacy by stopping abusive “robo-calls.” The legislative history “described these calls as ‘the scourge of modern civilization,

1 they wake us up in the morning; they interrupt our dinner at night; they force the
2 sick and elderly out of bed; they hound us until we want to rip the telephone out of
3 the wall.’ 137 Cong. Rec. 30, 821 (1991). Senator Hollings presumably intended to
4 give telephone subscribers another option: telling the autodialers to simply stop
5 calling.” Osorio v. State Farm Bank, F.S.B., 746 F.3d 1242, 1255-56 (11th Cir.
6 2014).

7 8 9 10 **II. JURISDICTION AND VENUE**

11 3. Jurisdiction of this Court arises under 28 U.S.C. §1331 and 47 U.S.C. §
12 227(b)(3). See Mims v. Arrow Financial Services, LLC, 565 U.S. 368 (2012)
13 holding that federal and state courts have concurrent jurisdiction over private suits
14 arising under the TCPA.

15
16 4. Venue is proper in the United States District Court for the Northern District
17 of New York pursuant to 28 U.S.C § 1391(b)(2) because Plaintiff resides within this
18 District and a substantial part of the events or omissions giving rise to the herein
19 claims occurred within this District.

20
21 5. The violations described in this Complaint occurred in New York.

22 23 24 **III. PARTIES**

25 6. Plaintiff is a natural person residing in Schenectady County, in the city of
26 Schenectady, New York, and is otherwise *sui juris*.

27
28 7. Defendant is a nationally chartered bank, doing business in the state of New

1 York, with its principal place of business located in McLean, Virginia. Defendant
2 is a “person” as defined by 47 U.S.C. §153 (39).
3

4 8. At all times relevant to this Complaint, Defendant has acted through its
5 agents, employees, officers, members, directors, heir, successors, assigns,
6 principals, trustees, sureties, subrogees, representatives and insurers.
7

8 IV. FACTUAL ALLEGATIONS

9 9. Defendant placed collection calls to Plaintiff seeking and attempting to
10 collect on alleged debts incurred through purchases made on credit issued by
11 Defendant.
12

13 10. Plaintiff is the “called party.” See Breslow v. Wells Fargo Bank, N.A., 755
14 F.3d 1265 (11th Cir. 2014).
15

16 11. Defendant placed collection calls to Plaintiff’s cellular telephone at phone
17 number (504) XXX-0242.
18

19 12. Defendant placed collection calls to Plaintiff from various telephone
20 numbers including, but not limited to, (800) 955-6600.
21

22 13. Upon information and belief, based on the number, frequency and timing of
23 the calls, and on Defendant’s prior business practices, Defendant’s calls were placed
24 with an automatic telephone dialing system.
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1 14. Defendant used an “automatic telephone dialing system,” as defined by 47
2 U.S.C. § 227(a)(1), to place telephone calls to Plaintiff seeking to collect a consumer
3 debt allegedly owed by Plaintiff.
4

5 15. Defendant’s calls were not for emergency purposes, which would be
6 excepted by 47 U.S.C. § 227(b)(1)(A).
7

8 16. Defendant’s calls were placed to a telephone number assigned to a cellular
9 telephone service for which Plaintiff incurs a charge for incoming calls pursuant to
10 47 U.S.C. §227(b)(1).
11

12 17. Defendant never received Plaintiff’s “prior express consent” to receive calls
13 using an automatic telephone dialing system or an artificial or prerecorded voice on
14 her cellular telephone pursuant to 47 U.S.C. § 227(b)(1)(A).
15

16 18. On or about June 8, 2018, Plaintiff spoke with a representative of Defendant’s
17 company at phone number (800) 955-6600, and told Defendant to stop calling her
18 cellular telephone.
19

20 19. During the June 8, 2018 conversation, Plaintiff gave Defendant her full social
21 security number and birthdate, in order to assist Defendant in identifying her and
22 accessing her accounts before asking Defendant to stop calling her cellular
23 telephone.
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1 20.Plaintiff revoked any consent, explicit, implied, or otherwise, to call her
2 cellular telephone and/or to receive Defendant's calls using an automatic telephone
3 dialing system in her conversation with Defendant's representative on June 8, 2018.

5 21. Despite Plaintiff's request to cease, Defendant continued to place calls to
6 Plaintiff's cellular phone after June 8, 2018.

8 22. Despite Plaintiff's request that Defendant cease placing automated collection
9 calls to Plaintiff via the use of an automatic telephone dialing system, Defendant
10 continued to place at least one hundred fifty-seven (157) telephone calls via the use
11 of an automatic telephone dialing system to Plaintiff's cellular telephone.

13 23. Defendant placed the great number of telephone calls to Plaintiff with the
14 sole intention of harassing Plaintiff in such a manner so as to cause Plaintiff to pay
15 the alleged debt claimed by Defendant, even when Plaintiff admittedly had impaired
16 ability to pay. This telephonic harassment caused Plaintiff considerable anxiety and
17 emotional distress.

19
20
21 **FIRST CAUSE OF ACTION**
22 **NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER**
23 **PROTECTION ACT - 47 U.S.C. §227(b)(3)(B)**

24 24. Plaintiff repeats and incorporates by reference into this cause of action the
25 allegations set forth above at Paragraphs 1-23.

1 25. The foregoing acts and omissions of Defendant constitute numerous and
2 multiple negligent violations of the TCPA, including but not limited to each and
3 every one of the above cited provisions of 47 U.S.C. § 227 *et seq.*

5 26. As a result of Defendant's negligent violations of 47 U.S.C. §227 *et seq.*,
6 Plaintiff is entitled to an award of \$500.00 in statutory damages, for each and every
7 violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

9 27. Plaintiff is also entitled to injunctive relief prohibiting such conduct in the
10 future.

12 WHEREFORE, Plaintiff, KAREN ESHELMAN, respectfully requests judgment
13 be entered against Defendant, CAPITAL ONE BANK (USA), N.A., as follows:
14

15 a. Awarding Plaintiff statutory damages of five hundred dollars (\$500.00)
16 multiplied by the number of negligent violations of the TCPA alleged herein, to wit:
17 one hundred fifty-seven (157) for a total of seventy-eight thousand five hundred
18 dollars (\$78,500.00);
19

20 b. Awarding Plaintiff actual damages and compensatory damages
21 according to proof at time of trial;
22

23 c. Granting Plaintiff such other and further relief as may be just and
24 proper.
25

26 **SECOND CAUSE OF ACTION**
27 **KNOWING AND/OR WILLFUL VIOLATIONS OF THE TELEPHONE**
28 **CONSUMER PROTECTION ACT**

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47 U.S.C. § 227(b)(3)(C)

28. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth above at Paragraphs 1-23.

29. The above listed acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above cited provisions of 47 U.S.C. § 227 *et seq.*

30. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227 *et seq.*, Plaintiff is entitled an award of one thousand five hundred dollars (\$1,500.00) in statutory damages for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

31. Plaintiff is also entitled to injunctive relief prohibiting such conduct in the future.

WHEREFORE, Plaintiff, KAREN ESHELMAN, respectfully requests judgment be entered against Defendant, CAPITAL ONE BANK (USA), N.A., as follows:

a. Awarding Plaintiff statutory damages statutory damages of one thousand five hundred dollars (\$1,500.00) multiplied by the number of knowing and/or willful violations of TCPA alleged herein, to wit: one hundred fifty-seven (157) for a total of two hundred thirty-five thousand five hundred dollars (\$235,500.00);

b. Awarding Plaintiff actual damages and compensatory damages

1 according to proof at time of trial;

2 c. Granting Plaintiff such other and further relief as may be just and
3 proper.
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5 **JURY TRIAL DEMAND**

6 Plaintiff demands a jury trial on all issues so triable.
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8
9
10 Dated: January 15, 2019

11 RESPECTFULLY SUBMITTED,
12

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